

**OPEN RECORDS AND MEETINGS OPINION
2005-O-06**

DATE ISSUED: May 11, 2005

ISSUED TO: Napoleon Economic Development Company

CITIZEN'S REQUEST FOR OPINION

This office received a request for an opinion under N.D.C.C. §44-04-21.1 from Leona Roehrich asking whether the Napoleon Economic Development Company ("NEDC") violated N.D.C.C. § 44-04-18 by not providing her with access to records regarding funds given to Bradford Enterprises ("Bradford") and Bradford's use of those funds. She also asked NEDC, if it failed to make the records available, to provide her with a written explanation of the legal authority for not doing so.

FACTS PRESENTED

On November 25, 2004, Ms. Roehrich requested from NEDC copies of all records regarding funds given to Bradford and Bradford's use of those funds. On or about December 10, 2004, NEDC provided Ms. Roehrich with a one-page handwritten list of payments by check showing the amounts paid to various entities, including Bradford. On December 21, 2004, she sent a second letter specifically requesting records regarding the \$50,000 from the city's one-cent sales tax money and the \$75,000 borrowed from Jamestown that she alleged was advanced to Bradford. Ms. Roehrich also requested records that would show how Bradford was using the money. Additionally, she requested a written explanation of the legal basis for withholding the information if the information was not made available to her by January 8, 2005.

According to Ms. Roehrich, she was informed on or about December 10, 2004, by the chairman of NEDC's board of directors that Bradford was going to prepare a year-end report. On or about January 8, 2005, Ms. Roehrich was advised that the report would not be available for two or three months, and it was possible there never would be a report. No additional records were ever made available to her; nor was she given a written explanation of the legal basis for withholding the records.

Mr. Rodney Kleppe, an NEDC coordinator, forwarded to this office copies of numerous documents, including correspondence between Bradford and NEDC, and the draft of an

expenditure summary for Bradford. According to the information provided to this office, both the city and NEDC have provided funds to Bradford to assist in the creation and development of a manufacturing facility in or near Napoleon.

ISSUES

Whether NEDC violated N.D.C.C. § 44-04-18 by failing to make available to Ms. Roehrich all records requested and by failing to provide in writing the legal basis for withholding copies of records.

ANALYSIS

The state's open records and meetings laws apply to all "records" and "meetings" of a "public entity." N.D.C.C. §§ 44-04-18, 44-04-19. The definition of "public entity" in N.D.C.C. § 44-04-17.1 is not limited to entities that are traditionally viewed as "governmental." It includes "organizations supported in whole or in part by public funds." See N.D.C.C. § 44-04-17.1(9), (12)(c) (definitions of "organization or agency supported in whole or in part by public funds" and "public entity," respectively). The city of Napoleon has a one-cent sales tax and a portion of it has funded NEDC projects, including the Bradford project. Documents submitted by NEDC confirm that the city of Napoleon and other public entities, including the state, provide funds for the general support of NEDC. Therefore, NEDC is a public entity. N.D.C.C. § 44-04-17.1(9). See also N.D.A.G. 2001-O-11 and N.D.A.G. 2001-O-10 (economic development corporations may be public entities); N.D.A.G. 98-O-24 (an organization supported in part by public funds is a public entity).

As a public entity, NEDC records may be subject to review by Ms. Roehrich. "Except as otherwise specifically provided by law, all records of a public entity are public records, open and accessible for inspection during reasonable office hours." N.D.C.C. § 44-04-18(1).

"Record" means recorded information of any kind, regardless of the physical form or characteristic by which the information is stored, recorded, or reproduced, which is in the possession or custody of a public entity or its agent and which has been received or prepared for use in connection with public business or contains information relating to public business.

N.D.C.C. § 44-04-17.1(15).

Ms. Roehrich asked to review all documents showing the amount of funds provided to Bradford by or on behalf of NEDC and all documents showing how Bradford was using the funds, including Bradford's end-of-the-year report. The NEDC's response was to provide her with a one-page handwritten summary of "information" relating to the request.

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The chairman of NEDC's board of directors informed a member of my staff that NEDC was not obligated to provide any documents in response to Ms. Roehrich's requests because at the time of the requests (November 25 and December 21, 2004) NEDC was awaiting a report from Global Capital, Financing & Marketing, Inc., regarding the status of Bradford's Napoleon project and might, as a result of the report, consider additional or revised support for Bradford. The NEDC argues this made its financial information preliminary and tentative and, as a result, NEDC's records relating to the Bradford project were not records it was required to produce under the open records law.

The NEDC apparently views its financial information as preliminary because it may decide to increase the amount of funds it gives Bradford. The indecision about increasing the funding level for Bradford is not relevant when deciding whether a document is a "record" under N.D.C.C. § 44-04-17.1(5). Documents that are complete in themselves are "records" subject to the open records laws. N.D.A.G. 98-O-10. Thus, NEDC may not withhold the records on the basis that its funding for Bradford could change. See N.D.A.G. 98-O-24 (entity's budget, which is merely a forecast of anticipated income and expenses, is a "record" as defined in N.D.C.C. § 44-04-17.1(15) even if it is speculative and outdated). In addition, a public entity is not authorized to merely extract or summarize information it considers relevant; the entity must provide access to or a copy of the responsive records. Therefore, it is my opinion that NEDC violated N.D.C.C. § 44-04-18 by failing to make the requested public records relating to Bradford available to Ms. Roehrich.

Some of the records responsive to Ms. Roehrich's request may, however, contain information that may be withheld from the public. Section 44-04-18.4, N.D.C.C., provides a "safe haven" from the open records law for certain categories of economic development records and information. N.D.A.G. 2001-O-10. Subsection 5 of N.D.C.C. § 44-04-18.4 makes trade secrets and commercial and financial information exempt from the open records laws unless that information is confidential under subsection 1 of N.D.C.C. § 44-04-18.4. Exempt information may be disclosed at the discretion of the public entity. N.D.A.G. 94-L-194. Confidential information generally may not be disclosed. Id.; N.D.C.C. § 12.1-13-01 (it is a class C felony to knowingly disclose confidential information).

Trade secret and commercial or financial information is confidential only if it is of a privileged nature and it has not previously been publicly disclosed. N.D.C.C. § 44-04-18.4(1). Information is of "a privileged nature" only if disclosing the records is likely to impair the public entity's ability to obtain necessary information in the future, or if it is likely to cause substantial harm to the competitive position of the entity supplying the information. N.D.A.G. 98-L-77; N.D.A.G. 98-L-17; N.D.A.G. 98-O-22. Thus, if release of the information responsive to Ms. Roehrich's requests would cause substantial harm to the competitive position of Bradford, then that information is privileged and confidential under

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N.D.C.C. § 44-04-18.4. Id. The determination as to whether a record contains a trade secret or commercial or financial information of a privileged nature as defined under N.D.C.C. § 44-04-18.4 is generally a factual decision to be made by the public entity. Id. If trade secrets or commercial or financial information is not confidential under subsection 1, it may be exempt under subsection 5 of N.D.C.C. § 44-04-18.4.

The terms “commercial” or “financial” information are not defined in the statute. Therefore, they are to be given their plain and ordinary meaning. N.D.C.C. § 1-02-02; N.D.A.G. 98-L-17; N.D.A.G. 94-L-1. Both the plain meaning of the terms and the interpretation of the terms in similar federal cases indicate that “commercial” and “financial” information refer broadly to information pertaining to commerce (buying or selling of goods or services) or finances (monetary resources). N.D.A.G. 98-L-17, citing The American Heritage Dictionary 297, 504 (2d coll. ed. 1991); Public Citizen Health Resource Group v. F.D.A., 704 F.2d 1280, 1290 (D.C. Cir. 1983); American Airlines, Inc. v. National Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978). Each record will need to be reviewed on a case-by-case basis to determine if it contains exempt or confidential information.

The second subdivision of N.D.C.C. § 44-04-18.4(5) does not apply, however, to records generated by the public entity itself rather than “received from” the person, business, or industry. N.D.A.G. 2000-O-07 (citing Buffalo Evening News, Inc. v. Small Business Admin., 666 F. Supp. 467, 469 (W.D.N.Y. 1987) (similar exception under the Freedom of Information Act)). Therefore, in general, records created by NEDC, including payments made to Bradford, are not closed records under this subdivision. If information which is exempt or confidential under N.D.C.C. § 44-04-18.4(5) has been included in a document generated by a public entity, however, those portions of the document which contain the exempt or confidential information may be redacted since those portions are exempt or confidential under the statute. N.D.A.G. 2000-O-07.

In determining whether some of the information requested is exempt or confidential, NEDC should keep in mind that a public entity may not deny a request for an open record because the record also contains exempt or confidential information. N.D.C.C. § 44-04-18.10(1). Rather, the entity is required to redact or excise the exempt or confidential information and disclose the rest of the record. N.D.C.C. § 44-04-18.10(2); N.D.A.G. 2004-O-23; N.D.A.G. 98-O-22. Further, it may be helpful to comment on the status of one document under consideration in this situation. Global Capital, Financing & Marketing, Inc., has a “Confidentiality and Non-Circumvention Agreement” in place which purports to prevent NEDC from disclosing information deemed confidential under the terms of the agreement. A public entity may not by contract agree to maintain the confidentiality of any record contrary to the open records law. N.D.C.C. § 44-04-18; N.D.A.G. 2004-L-25; N.D.A.G. 2002-L-06. The authority to withhold must be found within a lawful exception to the open records laws. N.D.A.G. 2004-L-25. Therefore, NEDC may not rely on the agreement alone to withhold a record from the public.

As noted in the facts section, Ms. Roehrich also asked for a written explanation of the legal reason for withholding the records if the information was not made available to her. A denial of a request for records must be in writing if requested. N.D.C.C. § 44-04-18(6). No written explanation was ever provided to her. It is, therefore, my opinion that NEDC violated N.D.C.C. §44-04-18(6) by failing to provide a written explanation of the legal basis for not providing copies of the documents.

CONCLUSION

The NEDC violated N.D.C.C. §44-04-18(1) by failing to provide access to requested documents and N.D.C.C. § 44-04-18(6) by failing to provide a written explanation of the legal basis for withholding copies of other documents.

STEPS NEEDED TO REMEDY VIOLATIONS

The Napoleon Economic Development Company must provide the requested records to Ms. Roehrich free of charge, but may excise from the records any material that is closed or confidential under N.D.C.C. § 44-04-18.4 or another applicable statute. If any information is excised or not provided, NEDC must explain in writing its legal authority for not providing the information.

Failure to take the corrective measures described in this opinion within seven days of the date this opinion is issued will result in mandatory costs, disbursements, and reasonable attorney fees if the person requesting the opinion prevails in a civil action under N.D.C.C. § 44-04-21.2. N.D.C.C. §44-04-21.1(2). It may also result in personal liability for the person or persons responsible for the noncompliance. Id.

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